Supreme Court, U.S.
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IN THE

United States Supreme Court

JOHN RICHARD KNOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether a "partners in crime" exception applies to the adverse spousal testimony privilege and whether the Court of Appeals erroneously concluded that Knock lacked standing to challenge the district court's application of the exception.

Question Two: Whether *Apprendi*[1] error properly preserved in the District Court is "structural error" under *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991) (the question this Court explicitly left open in *U.S. v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002)).

Question Three: Whether the doctrine of "harmless error" should shield the actions of a sentencing judge who explicitly and purposely refuses to follow the law and then purports to find his own "error" in doing so "harmless."[2]

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1 *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

2 Questions two and three are also being raised by Knock's co-defendant, Albert Madrid, in his petition for certiorari to this Court.

LIST OF PARTIES

United States of America, Plaintiff

John Richard Knock, Defendant

Albert Thomas Madrid, Defendant

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The Court of Appeals for the Eleventh Circuit's Decision dated June 6, 2003 affirming the convictions and sentence imposed by the United States District Court for the Northern District of Florida on John Richard Knock and his co-defendant Albert Thomas Madrid is not published. (App. pp. 1a-11a).[3] The Court of Appeals' order denying co-defendant Madrid's Petition for Rehearing and Rehearing *En Banc* is not published. (App. pp. 12a-13a).

The District Court's entered judgment on January 31, 2001. (App. pp. 14a-23a). The district court's Order adopting the "partners in crime" exception to the adverse spousal testimony privilege dated May 24, 2000 is not published. (App. pp. 35a-41a). The district court's Order dated January 23, 2001 denying the application of *Apprendi v. New Jersey* to Knock's sentence is not unpublished. (App. pp. 24a-34a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 2003 (Case Number 01-10894-BB (11th Cir. June 6, 2003). A petition for rehearing *en banc* by co-defendant Albert Thomas Madrid was denied on July 31, 2003. The jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

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[3] "App." refers to the Appendix herein.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit ("the Court of Appeals") (App. pp. 1a-11a), affirming a judgment of the United States District Court, Northern District of Florida, Gainesville Division ("the district court") (App. pp. 14a-23a), convicting and sentencing petitioner John Richard Knock ("Knock") to life in prison for marijuana conspiracy offenses with a twenty year concurrent sentence for money laundering. The District Court had original jurisdiction under 18 U.S.C. § 3231.

On February 17, 1999, in the Northern District of Florida, Knock and others were charged in a four count superseding indictment with: (1) conspiracy to possess with intent to distribute marijuana, (2) conspiracy to import marijuana, (3) conspiracy to commit money laundering, and (4) criminal forfeiture. Knock and co-defendant, Albert Thomas Madrid, were tried together.

Three weeks before trial, the government moved to disqualify Knock's counsel Michael Kennedy ("Kennedy"), due to the following five conflicts of interest: (1) Kennedy's prior representation of unindicted coconspirator David Kaplan, (2) his prior representation of alleged co-conspirator Jeffrey Kagel, (3) that Kennedy was the subject of an undescribed FBI/IRS investigation in New Jersey, (4) Kennedy's representation of alleged coconspirator Richard Buxton, and (5) his representation of unindicted coconspirator Robert Singer. The government later added the following four potential conflicts: (6) Kennedy's prior representation of Knock's wife, Naomi Knock ("Mrs. Knock" or "Naomi"), (7) that a subpoena was served upon Kennedy

in connection with the New Jersey investigation, (8) the government intended to introduce a letter seized from Knock in French prison wherein Mrs. Knock complains that Kennedy was dishonest and greedy to demand a $2.5 million fee, and (9) the government intended to compel Mrs. Knock to testify that she paid Kennedy with proceeds of the alleged drug conspiracy.

The district court addressed the purported conflicts at two pretrial hearings. At the first hearing, conducted on September 3, 1999, the government reiterated its concern about the ongoing criminal investigation of Kennedy and it *reluctantly* revealed that it would seek to introduce Mrs. Knock's testimony that she paid part of Kennedy's seeming $2.5 million fee with proceeds of the alleged conspiracy. The government stated that "there is further evidence that I didn't intend to get into, but it will show that Ms. Knock, Naomi Knock, went to Europe and delivered cash in Europe through another individual." According to the government, the jury would likely get "distracted" by Mrs. Knock's counsel-incriminating testimony, stating that "Ms. Knock in this letter is suggesting that Mr. Kennedy is involved in the elicit (*sic*) movement of money to her, and I think it's going to make it real difficult for the jury not to get distracted by that, and I do have real concerns that that causes a conflict that can't be dealt with." Through independent counsel, Michael E. Tigar, Esq., Kennedy conceded that he should be disqualified if there was *admissible* evidence to support the government's allegations; however, neither Mrs. Knock's testimony nor the letter she wrote to her husband were admissible because Mrs. Knock was asserting her privilege against being compelled to testify against her husband. The jury, therefore, would not be distracted.

Without ruling on the admissibility of Mrs. Knock's testimony or letter, the district court denied the government's motion. It found that the "[i]nvestigation of defense counsel, without more, is insufficient to demonstrate an actual conflict of interest." The court then proceeded to conduct a *Garcia*[4] hearing, wherein it elicited Knock's waiver of the first seven *waivable* conflicts of interest described above, including possible conflicts arising from the undescribed FBI/IRS investigation of Kennedy. Mrs. Knock's incriminating testimony and letter, conflicts eight and nine, were not discussed. Instead, the court stated:

> To my knowledge, that was all that I could find, going through the file, for a basis for a conflict or a potential conflict.
>
> And if the Government's aware of anything else, or Mr. Kennedy, if you yourself know of anything you'd like to express on the record, we'll do it now.
>
> . . .

No one mentioned Mrs. Knock's testimony or letter.

At trial, the government implicated defense counsel Kennedy in the alleged conspiracy by compelling Mrs. Knock to testify and read the letter to the jury on the eleventh day of trial that he laundered drug proceeds as part payment of his seeming $2.5 million fee. The day before, another witness testified that, in the summer of 1996, Mrs. Knock gave an individual $1 million dollars in a suitcase filled with German currency for Knock's legal defense. To connect this money to Kennedy, the

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[4] *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

government moved to compel Mrs. Knock's testimony. To the astonishment of defense counsel, the district court granted this motion by creating a "partners in crime" exception to the adverse spousal testimony privilege. (App. pp. 35a-41a). This prompted a spirited response from Kennedy, who argued that such testimony would impugn his credibility in the jury's eyes and created an unwaivable conflict of interest, which would require a mistrial. The district court denied the mistrial request.

The jury then heard Mrs. Knock's testimony implying that she agreed to pay Kennedy a $2.5 million fee and that she had arranged for a $1 million cash transfer to him. She also accused Kennedy of being greedy, and authenticated the letter she wrote to her husband wherein she complains that Kennedy demonstrated a "lack of honesty," which is a "serious confidence and trust issue that needs to be addressed." Of course, Kennedy could not take the stand to explain any of this, nor could he cross-examine Mrs. Knock.

On the evening of May 30, 2000, the jury convicted co-defendant Madrid on conspiracy to distribute marijuana, but acquitted him of the other two counts. Although the evidence against both defendants was basically the same, the jury convicted Knock on all three counts. The likely difference was Mrs. Knock's testimony and letter. After the jury had returned its verdicts but before sentencing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court rejected defendants' objections to the PSR under *Apprendi*, (App. pp. 24a-34a), and sentenced both defendants to life imprisonment with Knock receiving a concurrent twenty year sentence for money laundering.

With respect to the drug convictions, Knock was sentenced to life in prison under 21 U.S.C. § 841(b), which creates a three-tiered sentencing system for marijuana offenses based upon drug quantity. Where no quantity is specified in the indictment and determined by the jury beyond a reasonable doubt, the maximum permissible sentence is five years. *U.S. v. Allen*, 302 F.3d 1260 (11th Cir. 2002).

The district court acknowledged explicitly in its sentencing order that sentencing Knock to life was not permissible under the rule this Court announced in *Apprendi* because drug quantity had not been pled in the indictment nor proven to or found by the jury beyond reasonable doubt. (App. pp. 24a-34a). However, the district court avoided the clear requirement of the law by mischaracterizing the *Apprendi* error as having already occurred (when in fact no error had been committed at that point because no sentence had yet been imposed), then purporting to find its own "prior errors" harmless. *Id.*

Knock and Madrid's convictions and sentences were affirmed by the court of appeals on June 6, 2003. (App. pp. 1a-11a). By order dated July 31, 2003, the Court of Appeals denied Madrid's petition for rehearing and rehearing *en banc*. (App. pp. 12a-13a).

ARGUMENT

I

THIS COURT'S DECISION IN *TRAMMEL V. UNITED STATES* LEFT OPEN THE QUESTIONS OF WHETHER THE "PARTNERS IN CRIME" EXCEPTION APPLIES TO THE ADVERSE SPOUSAL TESTIMONY PRIVILEGE AND WHETHER THE DEFENDANT/NON-WITNESS SPOUSE MAY CHALLENGE THE DISTRICT COURT'S APPLICATION OF THE EXCEPTION ON APPEAL; A CIRCUIT SPLIT HAS RESULTED ON THESE ISSUES AND SHOULD BE RESOLVED BY THIS COURT

This Court's decision in *Trammel v. United States*, 445 U.S. 40 (1980), left open two important questions regarding the application and assertion of the adverse spousal testimony privilege: (1) whether a "partners in crime" exception applies to the privilege, and (2) whether the defendant/non-witness spouse has standing, *on appeal*, to challenge the district court's application of the exception. Certiorari should be granted because the courts of appeal have split in answering these questions.

The nature of the privilege and underlying social policy must be considered to understand the importance of resolving these questions. The adverse spousal testimony privilege protects a wife from being compelled to testify against her husband due to "the natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation.'" *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1028 (2d Cir. 1985) (quoting 8 Wigmore, *Evidence* § 2228 at 217)). The privilege also protects the sanctity of their marriage

from the public spectacle this would entail. *See Trammel v. United States*, 445 U.S. 40, 44 & 54 (1980); *United States v. Archer*, 733 F.2d 354, 359 (5th Cir. 1984). This privilege is distinct from the other spousal privilege, the confidential marital communications privilege, which forbids compelled disclosure of private communications between spouses. Whereas the confidential communications privilege applies to extrajudicial statements, may be invoked by either spouse, and pierced by a showing that the communications were in furtherance of joint criminal activity, *United States v. Mendoza*, 574 F.2d 1373, 1379-81 (5th Cir. 1978), the adverse spousal testimony privilege may be asserted only by a testifying spouse, *Trammel*, 445 U.S. at 54.

To date, the five courts of appeal that have decided the issue are split on whether the "partners in crime" exception applies to the adverse spousal testimony privilege. *See United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983) (adopting exception); *Trammel v. United States*, 583 F.2d 1166 (10th Cir. 1978) (adopting exception), affirmed on other grounds in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (rejecting exception), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) (rejecting exception); *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1025 (2d Cir. 1985) (rejecting exception), *vacated on other grounds sub. nom, United States v. Koecher*, 474 U.S. 133, 106 S.Ct. 1253 (1986); *Appeal of Malfitano*, 633 F.2d 276, 280 (3d Cir. 1980) (rejecting exception).

In declining to create a "partners in crime" exception, the Second, Third and Ninth circuits have focused on the fundamental purpose of the privilege—to protect the sanctity of marriage from the public spectacle of compelled adverse spousal testimony—and found that this purpose would be defeated by such exception. *See In re Grand Jury Subpoena*, 755 F.2d at 1027-28; *Malfitano*, 633 F.2d at 279 & n.5. Because the adverse spousal testimony privilege has ancient roots and protects highly important social interests, such as the right to marital privacy, the Second Circuit has cautioned that courts should "leave the creation of exceptions to the Supreme Court or to Congress." *In re Grand Jury Subpoena*, 755 F.2d at 1027-28. This Court, however, went to great lengths to affirm the Tenth Circuit's decision in *Trammel* on grounds other than a "joint crimes" exception, despite this being the basis for the Tenth Circuit's decision. *Id.* at 1026.

Thus far, the exception has not been applied in the Eleventh Circuit. *See United States v. Archer*, 733 F.2d 354, 359 n.3 (5th Cir.1984) (expressly reserving decision on this issue). However, the district court in this case, after finding that Knock and his wife were "partners in crime," followed the Seventh Circuit and applied the exception. (App. p. 38a). On Appeal, Knock argued that it was reversible error for the district court to compel Mrs. Knock's testimony by applying a "partners in crime" exception to the adverse spousal testimony privilege and urged the court to join the majority of other circuits in rejecting the exception. Further, Knock raised the important societal interests protected by the privilege, as articulated by this Court in *Trammel*, and argued that the creation of such an exception should be left to Congress or this Court.

In response to Knock's arguments, the court of appeals held that it "need not reach the district court's application of this exception because the Supreme Court has established that the adverse spousal witness privilege belongs to the testifying spouse and not the accused. (App. pp. 6a-7a, *citing Trammel v. United States*, 445 U.S. at 53). In doing so, the court of appeals impermissibly extended the holding of *Trammel*. Knock does not dispute that this Court in *Trammel* held that the adverse spousal testimony privilege may be asserted only by the witness spouse at trial. However, the *Trammel* Court did not hold, or even address, that the defendant/non-witness spouse lacks standing to raise a claim on *appeal* when, as here, the witness spouse properly objected at trial. Indeed, the Eighth Circuit has presumed standing in such circumstances. *See United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984) (standing presumed for non-witness spouse to pursue claim on appeal); *United States v. Bad Wound*, 203 F.3d 1072, 1074-75 (8th Cir. 2000) (same). The Eighth Circuit's approach is logical where, as here, it is the defendant/non-witness spouse who has been prejudiced by virtue of the fact that his wife was improperly compelled to testify and introduce highly inflammatory evidence against him.

Accordingly, Petitioner respectfully submits that this Court should grant certiorari to resolve the split between the Eighth and Eleventh Circuit on the standing issue, and furthermore, to reach and resolve the two to three split amongst five circuits regarding the application of a "partners in crime" exception to the adverse spousal testimony privilege.

II.

CERTIORARI SHOULD BE GRANTED TO ANSWER THE QUESTION LEFT OPEN BY THIS COURT IN *U.S. V. COTTON*; WHETHER PROPERLY-PRESERVED *APPRENDI* ERROR CONSTITUTES STRUCTURAL ERROR UNDER *ARIZONA V. FULMINANTE*

Certiorari should be granted here because the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court; namely, whether properly-preserved *Apprendi* error constitutes structural error under *Arizona v. Fulminante*. (U.S. Sup. Ct. Rule 10.1(a)).

In *Arizona v. Fulminante*, the Court defined structural errors as involving rights "so basic to a fair trial that their infraction can never be treated as harmless error." 499 U.S. at 308, 111 S.Ct. 1264 (quoting *Chapman*, 386 U.S. at 23, 87 S.Ct. 828).

The Eleventh Circuit held in *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) that *Apprendi* error is not structural, and that even where objection to *Apprendi* error is raised below, the appropriate standard of review is "harmless error" under Fed.R.Crim.P. Rule 52(a). *Nealy* directs that in order to discern whether the error is harmless, a reviewing court should evaluate the evidence presented at trial. 232 F.3d at 830. The Eleventh Circuit affirmed *Nealy* in *United States v. Sanchez*, 269 F.3d 1250, 1272-1273 (2001), and followed *Nealy* and *Sanchez* in *United States v. Anderson*, 289 F.3d 1321 (11th Cir. 2002). *Anderson* held that *Apprendi* error is harmless if, "[N]o reasonable juror could have found the defendant guilty

without also finding that the specific quantity of drugs was involved." 289 F.3d at 1327.

This Court, however, has not resolved the issue of whether *Apprendi* error is structural, and therefore not susceptible to a harmless error analysis. This Court expressly left that question open in *United States v. Cotton*, 535 U.S. at 633, 122 S. Ct. at 1786. In *Cotton*, this Court analyzed the defendants' *Apprendi* claim under the "plain error" standard of Fed.R.Crim.P. Rule 52(b), because the defendants had not objected below. Under Rule 52(b), reviewing courts apply a four-part test: There must be (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 633, 122 S. Ct. at 1786.

This Court cited to its prior decision in *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997), where it had explained that even structural errors are subject to Rule 52(b) analysis. 520 U.S. at 465-470, 117 S.Ct. 1547-1550. *Johnson* recognized that it might be true that if an error is structural it will always "affect substantial rights," but pointed out that there is no need to reach that question if the reviewing court determines that the claim fails on Rule 52(b)'s fourth prong. *Id.* In *Cotton*, this Court rejected the defendants' *Apprendi* claims on that basis, finding that on the facts before it, "[T]he error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." 535 U.S. at 633, 122 S. Ct. at 1786.

Here, unlike *Cotton*, defendants objected in the district court on *Apprendi* grounds to the imposition of their life sentences. By objecting below, Knock preserved the error, rendering it beyond the ambit of Rule 52(b) and that rule's fourth prong requirement. The error is therefore analyzed under Rule 52(a), and reversal is required if it affects the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1778-1778 (1993).

This case therefore squarely presents the issue left open by Cotton. Knock respectfully submits that *Apprendi* error is structural and therefore always affects substantial rights. Where, as here, objection below properly preserves the issue, *Apprendi* error should be per se reversible.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DOCTRINE OF "HARMLESS ERROR" SHOULD SHIELD THE ACTIONS OF A SENTENCING JUDGE WHO EXPLICITLY AND PURPOSELY REFUSES TO FOLLOW THE LAW AND THEN PURPORTS TO FIND HIS OWN "ERROR" IN DOING SO "HARMLESS."

Even if this Court determines that properly-preserved *Apprendi* errors are not in themselves structural errors (see Argument II, *supra*), certiorari should nonetheless be granted here because the Court of Appeals sanctioned the district court's extreme departure from the accepted and usual course of judicial proceedings, such as to call for an exercise of this Court's supervisory power. (U.S. Sup. Ct. Rule 10.1(a)).

This case was in a very unique posture at the time of sentencing. Absent a record like this one, a reviewing court could not assume that a district court intentionally "erred" rather than simply misapplied the law. The normal assumption must be that a district court is conscientiously applying the law. However, the district court here acknowledged on the record that a life sentence would be illegal under *Apprendi* but then imposed that sentence anyway after purporting to apply "harmless error" review to its own actions. (App. pp. 24a-34a).

Apprendi error is normally considered trial error. This makes analytical sense because *Apprendi* error is the failure to charge in the indictment, instruct the jury, and require a jury finding beyond a reasonable doubt as to drug quantity. Once the issue is before the appellate court, the sentence has been imposed, and that sentence would be legal but for those trial errors. The cohesion of this analytical framework is lost, however, when the district court usurps the appellate review function as the district court did here.

Here, at the time of sentencing, there had been no *trial error* under the charges set forth in the indictment. Knock was urging the district court not to commit *Apprendi* error by imposing an enhanced sentence on the basis of drug quantities that had not been found beyond a reasonable doubt by the jury.

The failure to instruct the jury regarding drug quantity, and the failure to require from the jury a finding beyond reasonable doubt as to drug quantity, were not *errors* at the time the district court issued its Order. Those failures merely meant that under *Apprendi*, Knock could only be sentenced to a maximum of five years on each of the two

drug convictions under the catch-all provision (21 U.S.C. § 841(b)). It was not until the *sentencing* in this case, when the district court imposed an enhanced sentence based upon drug quantity not proven to the jury, that error occurred. Without *trial* error, the harmless error analysis of *Nealy*, *Sanchez* and *Anderson*, *supra*, is inapplicable.

The important question here for the integrity of the judicial system, which merits this Court granting certiorari, is not whether a *reviewing court* can apply harmless error review to *Apprendi* error in cases where *Apprendi* was decided after trial but before sentencing. Of course it can. The determinative question is not, "At which stage of the proceedings was *Apprendi* decided?" but rather whether the district court committed a good-faith error as opposed to a result-oriented express disregard for the rule of law announced by this Court.

There may often be a multitude of interpretations and unanswered questions among lower courts in the wake of a decision like *Apprendi* that so radically alters the legal landscape. District court judges operating in good faith are bound to make honest mistakes especially in transitionary periods, and such judges are entitled to the deference accorded by application of the Fed.R.Crim.P. Rule 52(a) standard of review. But that is not what happened here. The district court explicitly acknowledged it was refusing to follow the law as required by this Court in *Apprendi*, and purported to find its own "error" in doing so harmless. (App. pp. 24a-34a). Such disregard for the law impugns the integrity of the judiciary and of the judicial process. This Court should grant certiorari to ensure

that the rule of law is respected, even when the result of doing so may be unpalatable to district court judges.

Prior to sentencing, Knock advised the district court that the only district court in the Eleventh Circuit to address this issue was in *United States v. Salery*, 119 F.Supp.2d 1268 (M.D.Al. 2000). In *Salery*, the court held that, *although arguably sufficient evidence was presented to support the drug quantity specified in the indictment*, the lack of a specific jury finding of such amount precluded sentences beyond the statutory maximum. *Id.* (emphasis added). Of significance, the court stated that "even if the error could be considered harmless error, however, *it is not appropriate for a district court to commit error simply* because it might be found to be harmless." *Id.* at 1272, n.3 (emphasis added).

The holding of *Salery* is consistent with the Advisory Committee Notes to Rule 52, which clearly state that harmless error analysis is reserved for *post*-judgment review:

> This rule is a restatement of existing law, 28 U.S.C. former § 391: On the hearing *of any appeal, certiorari, writ of error, or motion for a new trial*, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Advisory Committee Note to FRCP 52(a).

Knock submits that even if this Court determines that *Apprendi* error is not normally structural, the error here constitutes structural error because the fundamental

requirement that district courts not purposefully refuse to apply controlling law is, "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Arizona v. Fulminante*, 499 U.S. at 308 (quoting *Chapman*, 386 U.S. at 23).

CONCLUSION

For the foregoing reasons, Knock respectfully requests that certiorari be granted.

Dated: October 27, 2003

By: /s/ MICHAEL KENNEDY
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[DO NOT PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10894

Filed June 6, 2003

D.C. Docket No. 94-01009-CR-1-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RICHARD KNOCK, a.k.a. John Richard Phillips, a.k.a. Mickey Ryan, a.k.a. Michael Phillip Ryan,
ALBERT THOMAS MADRID,

Defendants-Appellants.

Appeal From the United States District Court for the Northern District of Florida

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Before:

BIRCH, HULL and RONEY,

Circuit Judges.

PER CURIAM:

Defendants John Knock and Alfred Madrid appeal their convictions and life sentences in connection with a conspiracy to possess with the intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), and 846. They argue several trial errors: (1) failing to disqualify Knock's attorney; (2) compelling Knock's wife to testify against him; (3) constructively amending the indictment; (4) admitting into evidence a plea agreement Madrid made in Canada; (5) excluding the testimony of Madrid's mother; and (6) violating *Apprendi* in sentencing. We AFFIRM.

A. The Defendants' Drug Conspiracy.

Viewing the record in the light most favorable to the government, Defendant Knock headed a drug organization from 1984 to 1993 that imported and distributed approximately 790,000 pounds of marijuana into the United States, and in turn laundered proceeds from that drug operation. When the penalties for United States drug offenses became more severe in the 1990's, Defendant Knock conducted less business in the United States and transferred some of his business to Canada. Defendant Madrid worked directly under Knock, engaging in offloading and distribution of the marijuana during the conspiracy. Madrid was present at stash-houses where the hashish was stored. In 1987, a ship containing thirty (30) tons of marijuana was transported into California. The marijuana was offloaded and taken to Madrid's nearby property, where Knock, Madrid, and others re-packaged the marijuana for distribution.

Canadian officers apprehended Madrid in Vancouver in July 1992. After bonding out of Canadian prison, Madrid fled to Mexico and was arrested by Mexican officials at the

request of the Canadian government. Madrid was sent back to Canada for prosecution. He eventually entered into a plea agreement with Canadian officials. Knock fled to France, was arrested by French officials, and fought extradition to the United States. Knock was eventually extradited and subsequently arrested in Gainesville, Florida. Shortly thereafter, Madrid was extradited from Canada to the United States for the instant criminal case.

A grand jury charged the defendants with the following: Count 1—conspiracy to possess with the intent to distribute marijuana, 21 U.S.C. § 841(a)(1) and b(1)(A)(vii); Count 2—conspiracy to import marijuana, 21 U.S.C. §963; Count 3—conspiracy to commit money laundering, 18 U.S.C. § 1956(h); and Count 4—criminal forfeiture, 21 U.S.C. § 853. The jury convicted Knock as charged but only convicted Madrid as to Count 1. No drug quantity was alleged in the indictment. The defendants were both sentenced to life imprisonment. Defendants timely appealed to this Court making several overlapping arguments.

B. The District Court Properly (1) Denied the Government's Disqualification Motion of Kennedy and (2) Ruled that Knock Waived Any Potential Conflict Relating to Kennedy Representing Him.

The government filed a pre-trial motion to disqualify Michael Kennedy, Knock's attorney, expressing, *inter alia*, its concern that (1) Kennedy could have a potential conflict in his former representation of Naomi Knock, a potential adverse witness, and (2) that Kennedy was subject of grand jury investigation in New Jersey. Attached to the government's motion was a letter seized by French prison officials to Knock from his wife, Naomi. This letter is the subject of various arguments in Defendants' appeal. The

letter primarily concerned Kennedy's attorney fee and referenced Naomi's recent contacts with Kennedy regarding the same. Knock vigorously opposed the government's motion to disqualify Kennedy in a detailed memorandum of law. The district court ultimately denied the government's motion, ruling *in favor of* Knock.

Knock, nevertheless, appeals the denial, arguing that the district court erred in not specifically informing him that Naomi's testimony and letter could prejudice him by implicating Kennedy in a crime. The record is replete with evidence that Knock was made fully aware of all possible conflicts relating to Kennedy serving as his attorney. There is undisputed evidence that Knock, both personally and through his counsel Kennedy, sought to waive all of these conflicts. It is axiomatic that there is both a presumption in favor of a defendant's counsel of choice, and that a trial court has "substantial latitude" in deciding whether to disqualify counsel. *Wheat v. United States*, 486 U.S. 153,163 (1988). The district court carefully considered several permutations involving Kennedy's involvement in this case in its pre-trial order denying the government's motion to disqualify. The district court then revisited these permutations at a subsequent *Garcia* hearing, where it throughly advised and questioned Knock on a litany of potential conflicts. *See United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Repeatedly, Knock testified that he waived all conflicts in Kennedy representing him. As Knock unequivocally testified throughout the *Garcia* hearing, "I waive any conflict . . . I have no desire to talk to another attorney. . . . I have no need to question [Kennedy's] representation of me."

At the conclusion of that hearing, Kennedy, who continues to represent Knock on this appeal, stated to the district court:

> And I want to make it clear that I have discussed [the potential conflict] in detail with Mr. Knock, and I have encouraged him, as he has a right to do, to obtain another lawyer permanently or just for the purposes of discussing this, and I believe he understands that. And I'll say as an officer of the court I believe this to be a knowing, intelligent waiver on this part.

The district court properly held that any conflicts of interest relating to Kennedy representing Knock were waivable. In any event, there is a reasonable argument that the evidence before the court showed no actual conflict to exist. Under the totality of the circumstances, the district court did not err by finding waiver of conflict, if there was a conflict at all, and did not abuse its discretion by denying the government's motion to disqualify. *See generally Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en banc).

C. Compelling Knock's Wife to Testify Against Him at Trial Was Not Reversible Error.

Knock argues that the district court violated the adverse spousal testimony privilege by granting the government's motion to compel his wife to testify against him.

Government witnesses testified that Naomi Knock gave a suitcase filled with $1,000,000 in German currency to an unindicted co-conspirator, Steve Abelman, suggesting (1) that the $1,000,000 were proceeds from the alleged drug conspiracy, and (2) that Naomi was attempting to launder those proceeds. The government thereafter sought to call Naomi to testify. Naomi objected to testifying by asserting (1) her Fifth Amendment right against self-incrimination, which the government dispelled by granting her immunity,

(2) the adverse spousal testimony privilege, and (3) the confidential marital communications privilege. The government filed a motion to compel Noami's testimony. Knock opposed the motion to compel, asserting, *inter alia*, the confidential marital communications privilege. After a hearing, the court ruled that Naomi's marital communications and spousal witness privilege claims were overcome by a joint participants in crime exception to those privileges. Knock then objected to Naomi testifying and moved for a mistrial, which the district court denied.

Naomi testified that she had written a letter to her husband, stating that she had discussions with Kennedy and that overall attorneys' fees and costs would be $2.5 million. Naomi further testified that the $1,000,000 referred to by Abelman "would probably be consistent" with the total amount that was passed on to Abelman in order to assist with her husband's defense but insisted that she did not *directly* pass the $1,000,000 to Abelman. Naomi then testified that she, at her husband's request, had "released" $1,000,000 in funds for her husband's defense. She insisted that she neither had "control" of those funds nor did she know where they came from. Knock's counsel did not cross-examine Naomi.

Knock now attempts to assert the adverse spousal testimony privilege by arguing that the district court legally erred by "unilaterally" creating a joint participant in crime exception to the spousal witness privilege during trial, an exception recognized by other circuits courts but not expressly by this Court. *See, e.g.*, *United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983). This Court need not reach the district court's application of this exception because the Supreme Court has established that the adverse spousal witness privilege belongs to the testifying

spouse and not the accused spouse. *See Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Singleton*, 260 F.3d 1295, 1297 n.2 (11th Cir. 2001) (noting that the adverse spousal testimonial privilege "can be asserted only by the witness-spouse"). That is, Knock did not have standing to assert this privilege during his trial and thus does *not* have standing to assert the same in this appeal. *See Trammel*, 445 U.S. at 53. The standing to assert that privilege and any violation thereof was held by Naomi, the testifying spouse, and *not* a party to this appeal.

The district court did not err in denying the confidential marital communication on the ground the privilege does not protect communications "between husband and wife about crimes in which they are jointly participating." *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).

D. The District Court Did Not Constructively Amend the Indictment.

The defendants argue that the district court constructively amended the indictment or, alternatively, that there was insufficient evidence to support the jury's verdict that there was an overt act in furtherance of the conspiracy in the Northern District of Florida. Specifically, they argue that the indictment stated that the conspiracy counts occurred "in the Northern District of Florida," and that the district court improperly broadened the indictment to include activities that occurred inside *or* outside the jurisdiction of the Northern District of Florida.

The text of the indictment shows that the government alleged the conspiracy to be "in the Northern District of Florida and elsewhere." This Court has upheld similar generally-worded criminal conspiracy indictments. *See United*

States v. Bascaro, 742 F.2d 1335, 1348 (11th Cir. 1984) (holding an indictment sufficient that alleged a conspiracy occurred "within the Northern District of Florida, and elsewhere"). An indictment is sufficient if it informs the defendant of the charges against him and enables him to plead double jeopardy in the case of a future prosecution. Neither defendant in this case could have been retried if found innocent by the jury without a violation of the double jeopardy clause.

In any event, viewed in the light most favorable in the government, the evidence supports a conclusion that there was an overt act in the Northern District of Florida. For example, there is record evidence that Nicholas Grenhagen, an individual who worked for the charged drug organization, met with Carl Lilley, an undercover Drug Enforcement Agency Agent posing to have several boatloads of marijuana to sell in the Spring of 1994, in Gainesville, Florida (a city within the Northern District of Florida). Additionally, the record indicates that there were several phone calls from unindicted co-conspirators relating to the sale of marijuana to DEA Agent Lilley in Gainesville, Florida. There was no error.

E. Admitting Madrid's Canadian Plea Agreement Was Not Error.

At trial, over Madrid's objection, the district court admitted the plea agreement which Madrid entered into in Canada. The four-page plea agreement referenced and contained four appendices, Appendices A through D. The last page of the plea agreement was signed by Madrid's Canadian attorney "as agent for Joseph Albert Madrid" but did not include a signature block for Madrid to sign. Appendix "A," the only Appendix Madrid disputes, was a statement

of facts relating to the pleaded to offenses. It did not have any signature blocks, and Madrid thus did not sign it. The facts stated in Appendix A summarized the plea to the Canadian drug conspiracy and was prepared by Canadian prosecutors relying upon reports gathered by Royal Canadian Mounted Police Officers.

On appeal, Madrid neither disputes the enforcement of the plea agreement nor that the agreement contained four appendices. Instead, he argues that his Canadian attorney did not have authority to sign the plea agreement if the facts alleged in Appendix A were intended to have been deemed admitted. Madrid contends that Appendix A was the only Appendix that he did not sign, emphasizing that he did not intend for it to be part of the plea agreement. Madrid filed a declaration from his Canadian attorney stating that he had not intended the statement of fact to be a part of the final Canadian plea agreement. Although Madrid argued in the district court that the plea agreement was cumulative and contained no significant evidence which the jury had not already heard, he argues on appeal that Appendix A was inadmissible hearsay and it was an abuse of discretion for the district court to admit it at trial.

The government filed an affidavit by Theresa Brucker, the Canadian official who signed Madrid's plea agreement on behalf of the Canadian government, stating "If Albert Madrid had taken the position that he did not agree to facts set out in the statement of facts forming part of the plea agreement it would have been incumbent upon me as an officer of the court to so advise the sentencing judge, and to ask Albert Madrid's plea be struck and that matter be set down for trial."

The district court did not abuse its discretion in admitting the Canadian plea agreement. We need not decide

whether Madrid's Canadian attorney was expressly authorized to sign the plea agreement if it included Appendix A because evidence presented in the district court suggests that Appendix A was an *essential* portion of the plea agreement. Put another way, if the statement of facts contained in Appendix A to the Canadian plea agreement was not intended to be part of Madrid's plea agreement, then the plea itself, according to Ms. Brucker, would not have been valid. Moreover, the lead investigator for the Royal Canadian Mounted Police, as well as twenty-one other Royal Canadian Mounted Police Officers, testified as to the facts contained within Appendix A of Madrid's plea agreement.

Because of the overwhelming evidence presented in the lengthy criminal trial against Madrid, any error in admitting Appendix A of the plea agreement, if error at all, was harmless. *See United States v. De La Mata*, 266 F.3d 1275, 1300-01 (11th Cir. 2001) (finding harmless error in the improper admission of hearsay against a criminal defendant).

F. The District Court Did Not Abuse Its Discretion By Excluding The Testimony of Madrid's Mother.

Madrid sought to have his mother testify that the $25,000 she had paid to Madrid's defense attorney came from her bank account and a bank loan. The district court held the testimony was irrelevant. On appeal, Madrid argues that the district court abused its discretion by excluding that evidence. A review of the record shows that the government never contended Madrid was illegally transferring his money or used his own for unaccounted money to pay attorney's fees.

The district court did not abuse its discretion by excluding the testimony of Madrid's mother as irrelevant.

G. There is No *Apprendi* Error.

Knock and Madrid challenge their life sentences under *Apprendi* because the indictment did not charge and the jury did not find a particular quantity of marijuana involved in the alleged drug conspiracy. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Supreme Court decided *Apprendi*, *after* the jury's guilty verdict but *before* sentencing. The defendants argue that the district court "refused" to apply *Apprendi* principles, resulting in *per se* structural error not subject to harmless error review. This Court has expressly rejected this structural error argument, holding that "*Apprendi* error does not require reversal of the sentence if that error is harmless." *United States v. Anderson*, 289 F.3d 1321, 1326 (11th Cir. 2002) (citing *United States v. Sanchez*, 269 F.3d 1250, 1272-75 (11th Cir. 2001) (en banc)). In view of the overwhelming record evidence of the massive drug conspiracy alleged in this case, no reasonable juror could have found the defendants guilty of conspiracy to possess with the intent to distribute marijuana from 1982 and 1996 without finding the minimum 1,000 kilograms threshold to impose a life sentence under 21 U.S.C. §§ 841(b)(1)(A)(vii), 846. *See Anderson*, 289 F.3d at 1328-29 (holding any *Apprendi* error to be harmless for defendant indicted and convicted without regard to drug quantity prior to the *Apprendi* decision but sentenced after that decision). Therefore, there was no error in either Knock's or Madrid's sentence.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10894 BB

Filed July 31, 2003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RICHARD KNOCK, a.k.a. John Richard Phillips, a.k.a. Mickey Ryan, a.k.a. Michael Phillip Ryan, ALBERT THOMAS MADRID,

Defendants-Appellants.

On Appeal From the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____ F.2d ____).

Before:

BIRCH, HULL and RONEY,

Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Gainesville

Case # 1:94CR01009-001(S)

Filed January 31, 2001

UNITED STATES OF AMERICA

—vs—

JOHN RICHARD KNOCK

Defendant's Attorney: Michael Kennedy (Retained)
New York, New York

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Counts 1-3 of the Indictment on May 30, 2000. Accordingly, IT IS ORDERED that the defendant is adjudged guilty of such count(s) which involve(s) the following offense(s):

TITLE/SECTION NUMBER	*NATURE OF OFFENSE*	*DATE OFFENSE CONCLUDED*	*COUNT*
21 USC 841(a)(1), 841(b)(1)(A)(vii) and 846	Conspiracy to Possess With Intent to Distribute Marijuana	April 17, 1996	One

TITLE/SECTION NUMBER	*NATURE OF OFFENSE*	*DATE OFFENSE CONCLUDED*	*COUNT*
21 USC 952, 960(b)(1)(G) and 963	Conspiracy to Import Marijuana	April 17, 1996	Two
18 USC 1956(a)(2)(A) and 1956(h)	Conspiracy to Launder Monetary Instruments	April 17, 1996	Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

Counts 1-4 of the indictment are dismissed on government motion.

The defendant is subject to forfeiture as cited in count 4 of the Indictment.

Entered on Docket: 1-31-01 By: LT

(Rules 58 & 79(a) FRCP or 32(d)(1) & 56 FRCR:
Copies mailed to: USATTY, KENNEDY,
USM, USPO, FINANCE

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until

all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 313-48-2968
Defendant's Date of Birth: 9/18/47
Deft's U.S. Marshal No.: 11150017

Defendant's Residence Address:
42 Rule De La Sante
Paris, France
Defendant's Mailing Address:
Same as Above

Date of Imposition of Sentence:
January 30, 2001

/s/ MAURICE M. PAUL
MAURICE M. PAUL, SENIOR
UNITED STATES DISTRICT JUDGE

January 31, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life as to counts 1 and 2 and 20 years as to Count 3, all to run concurrent with each other.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years as to Counts 1 and 2 and 3 years as to Count 3, all to run concurrent with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this count:

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer 10 days prior to any change in residence or employment, unless otherwise directed by the probation officer;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that he defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall not own or possess a firearm, dangerous weapon or destructive device.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the United States Probation Office.

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court,and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	*Fine*	*Restitution*
$300.00	$1,411,476,800.00	

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of $300.00 is imposed.

FINE

A fine in the amount of $1,411,476,800.00 is imposed.

The court has determined that the defendant does not have the ability to pay interest.

It is ORDERED that:

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interests; (7) penalties in full immediately

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except:

As to paragraph 19, the defendant's objection reference the load of marijuana seized off the coast of New Jersey in 1984 is sustained, as it does not affect the applicable sentencing guideline range and the government did not take a position as the objection.

Guideline Range Determined by the Court:

Total Offense Level: 45
Criminal History Category: 1
Imprisonment Range: Life as to counts 1, 2 and 20 years as to count 3.
Supervised Release Range: 5 years as to counts 1, 2 and 2-3 years as to count 3.
Fine Range: $25,000.00 to $1,411,476,800.00

The sentence is within the guideline range, the range does not exceed 24 months, and the count finds no reason to depart from the sentence called for by the application of the guidelines.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
Gainesville Division

CASE NO. 1 94cr1009 MMP

Filed January 23, 2001

UNITED STATES OF AMERICA,

vs.

JOHN KNOCK and ALBERT MADRID,

Defendants.

ORDER

This matter was previously before the Court for the sentencing of John Knock and Albert Madrid. At the sentencing hearing, however, the Court indicated to the parties that further briefing would be required on various issues involving the Supreme Court's opinion in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). The parties have submitted a series of memoranda, and the matter is now ripe for adjudication on the issues raised by *Apprendi*.

The defendants Knock and Madrid were charged in three substantive counts in a Superseding Indictment (doc. 414). Count One charges that they "did knowingly and willfully combine, conspire, confederate and agree with each other

and with others to possess with the intent to distribute the controlled substance marijuana, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)-(vii)" all in violation of the conspiracy section, 21 U.S.C. § 846. Count Two charges that they "did knowingly and willfully combine, conspire, confederate and agree with each other and with others to import into the United States from a place outside thereof the controlled substance marijuana, in violation of Title 21, United States Code, Sections 952 and 960(b)(1)(G)" all in violation of the conspiracy provision 21 U.S.C. § 963. Count Three charges that they "did knowingly and willfully combine, conspire, confederate and agree with each other and with others to transport funds from a place in the United States to a place outside the United States, which activity was to be conducted with the intent to promote the carrying on of a specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(2)(A)" all in violation of the conspiracy provision, 18 U.S.C. § 1956(h). Count Four is a forfeiture count.

As the above language indicates, Counts One and Two of the Superseding Indictment referred to particular penalty provisions of the various criminal statutes but did not list the specific amounts of drugs necessary to trigger each provision. For example, Count One charged that 21 U.S.C. § 841(b)(1)(A)(vii) is the applicable penalty provision for the amount of drugs involved in Count One, but does not expressly state any amount of drugs. However, 21 U.S.C. § 841(b)(1)(A)(vii), only applies to a defendant whose offense involves 1000 kilograms or more of marijuana. Thus, although the amount of drugs is not expressly alleged in the indictment, it is implicitly alleged by the reference to the particular penalty provision. The same is

true of Count two, which refers to 21 U.S.C. § 960(b)(1)-(G), which requires that 1000 kilograms of marijuana be involved in the violation.

The defendants did not object to the Superseding Indictment on the basis that drug amounts or money amounts under Count Three should have been set out in the Superseding Indictment. Also, in their sentencing memoranda the government and the defendants agree that neither side challenges the Superseding Indictment on this basis now.

The defendants were eventually brought to trial on the above charges. At the trial, the government offered evidence of various shipload-sized deliveries of marijuana, each of which clearly contained far more than 1000 kilograms of marijuana. The defendants did not offer evidence that the shiploads were somehow less than 1000 kilograms and did not even challenge the existence of the shiploads. Instead, they relied on a theory that the activity charged in the Superseding Indictment did not come under United States jurisdiction because it occurred in Canada.

Prior to jury instruction, the parties were given an opportunity to submit proposed jury instructions and were also given an opportunity to object to the court's final version of the instructions before they were read to the jury. The defendants did not request an instruction regarding the specific amount of drugs or laundered money involved and did not object on this basis to the court's final instructions. Thus, no instruction regarding the specific amount of drugs was read to the jury regarding Counts One and Two, and no instruction regarding the amount of laundered money involved in Count Three was read to the jury.

Additionally, a proposed verdict form was part of the court's final jury instructions, and the parties were allowed to review and object to the verdict form. The verdict form

did not require the jury to find the amount of drugs or laundered money beyond a reasonable doubt. The defendants did not raise any objection to the verdict form on this basis.

John Knock was found guilty on all three counts, and the probation department prepared a Presentence Report (PSR) which recommended application of the penalty provisions listed in the indictment which resulted in a recommended sentence of life imprisonment. Albert Madrid was found guilty on Count One and acquitted of Counts Two and Three, and his PSR recommended application of the penalty provision listed in Count One and a sentencing range of 324-405 months plus an upward departure. Prior to sentencing, however, the defendants objected to the PSR on *Apprendi* grounds.

With regard to *Apprendi*, the defendants argue that, first, *Apprendi* requires that defendants only be sentenced for Count One under 21 U.S.C. § 841(b)(1)(D), which does not require a finding of drug quantity, and which carries a 5-year maximum. Additionally, John Knock contends that the factual findings which underlay the determination of his Guidelines range for money laundering should have been made by the jury, according to *Apprendi*. In essence, he argues that no Guidelines factor, including enhancements, can be applied by the judge at sentencing if the application requires any factfinding. Thus, after some recalculation, Knock concludes that the maximum Guidelines range he could receive is based on an offense level of 24.

The recent Eleventh Circuit case of *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000) squarely addresses both of the above arguments. First, in footnote three, the *Nealy* court holds that "[t]he Sentencing Guidelines are not subject to the *Apprendi* rule. *Apprendi*, 120 S.Ct. at 2366

n. 21. The Guidelines allow the sentencing judge to consider relevant conduct to determine overall drug quantity in calculating the base offense level. U.S.S.G. § 1B1.3(a)." Thus, the argument regarding application of the Guidelines must be rejected, and Knock can point to no possible *Apprendi* error in the recommendation of the PSR with regard to Count Three. *See also U.S. v. Ulloa-Porras* 2001 WL 15527 (10th Cir. Jan. 8, 2001); *Edwards v. United States*, 523 U.S. 511, 515 (1998) (noting difference between challenges to sentence in excess of the statutory maximum and sentence within statutory range); U.S.S.G. § 5G1.1 (providing that Guidelines sentence may not exceed statutory maximum).

Turning to Counts One and Two, the Court notes that *Nealy* dictates that the failure to submit the drug amount to the jury must be reviewed under the harmless error standard, even if the defendant preserves all objections regarding *Apprendi*. In *Nealy*, the defendant did more than Knock and Madrid to preserve his *Apprendi* objections. Before jury instructions were given, he requested that a drug-quantity instruction be read. Additionally, before sentencing, he objected to a sentence based on drug quantity not found by the jury beyond a reasonable doubt. Despite the fact that Nealy had thus preserved his objections and despite the fact that the Eleventh Circuit recognized that an error had occurred based on *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), the court applied the harmless error standard and refused to overturn Nealy's sentence. The Court stated:

> Because Defendant was sentenced under § 841(b)(1)(A) and because his 32-year sentence exceeds the 30-year statutory maximum for each count, an error has occurred.

> But failure to submit the issue of drug quantity to the jury is, in this case, harmless error that does not require reversal. *Apprendi* did not recognize or create a structural error that would require per se reversal. *United States v. Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000). And a constitutional error is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (applying harmless error analysis to failure to submit issue of materiality to jury); *see also Swatzie*, 228 F.3d at 1283 (noting that "error in *Neder* is in material respects indistinguishable from error under *Apprendi*"). Harmless error is appropriate because it "block[s] setting aside [sentences] for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Neder*, 119 S.Ct. at 1839 (quoting *Chapman v. California*), 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967)). We must affirm Defendant's sentence if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity. *See Neder*, 119 S.Ct. at 1837.

The *Nealy* panel then reviewed the evidence submitted at the trial and concluded that even had the quantity issue been submitted to the jury, the record did not contain evidence that could rationally lead to a contrary finding with regard to drug quantity. The panel stated:

> An officer testified at trial that Defendant at the scene admitted that the cocaine base was his. Defendant was convicted for this possession (count II); and, given the undisputed evidence about drug quantity, no reason-

> able jury could have rationally concluded that Defendant was guilty of the substantive offense—possession, with intent to distribute of the cocaine base in his backpack—but that the amount of cocaine possessed was less than 5 grams.

Accordingly, the *Nealy* court found that "failure to submit drug quantity to the jury was harmless beyond a reasonable doubt." *Nealy*, 232 F.3d at 830.

In the instant case, the defendants did not dispute the fact that the only evidence submitted to the jury was of shipload-sized loads of marijuana clearly greater than 1000 kilograms. Thus, as in *Nealy*, no reasonable jury could have rationally concluded that Defendants were guilty of the substantive offenses—conspiracy to possess with intent to distribute marijuana or conspiracy to import marijuana—without also concluding that the amount of marijuana possessed was more than 1000 kilograms. Thus, under the logic of *Nealy*, the prior error of this court to instruct the jury regarding drug amounts and the prior error of this court in failing to require the jury to find those drug amounts beyond a reasonable doubt constitute errors which are harmless beyond a reasonable doubt.[1] Thus, sen-

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[1] The court determines that a sentencing court properly applies the harmless error rule when examining its own prior errors. Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.") and Fed. R. Crim. P. 54(a) (the rules of criminal procedure, including Rule 52(a), "apply to all criminal proceedings in the United States District Courts" as well as to the Courts of Appeal and the Supreme Court.). Fed. R. Crim. P. 52(a) was relied upon by the Supreme Court in *Neder*, and the Eleventh Circuit relied heavily upon *Neder*. Thus, pursuant to Rule 54(a) and Rule 52(a), this court is required to disregard any error which does not affect substantial rights. Here, although the defendants argue that their freedom is obviously a substantial right, they fail to

tencing the defendants as the PSR recommends would not violate *Apprendi* in this case.

Two recent cases issues by the Eleventh Circuit do not affect this analysis. *U.S. v. Gerrow*, 232 F.3d 831 (11th Cir. 2000); *U.S. v. Shepard*, 2000 WL 1839206 (11th Cir. 2000), are different cases than that before the Court. In these cases, the Eleventh Circuit applied a different kind of harmless error analysis that seems to have been created especially for post-*Apprendi* cases. Both panels found that the failure to include drug amounts in the indictment and to submit the amount issue to the jury were error under *Apprendi* and *Rogers*. Additionally, *Shepard* found that the defendant had preserved the error by objecting before sentencing. Nevertheless, both cases allowed the convictions and the sentences to stand because the actual sentences, although given out under 21 U.S.C. § 841(b)(1)(A), were actually less than the 20 year maximum under 21 U.S.C. § 841(b)(1)(C). Thus, *Shepard* concluded that "[b]ecause Shepard's sentence falls within the authorized range, we find no prejudice", and *Gerrow* concluded that "there is no error, plain or otherwise, under *Apprendi* where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." Because these cases involved actual sentences below the maximum for the catch-all provision of subparagraph (C), the panels did not have to confront the thorny issues confronted directly in *Nealy* and so *Nealy* provides more relevant direction in the instant case.

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address the fact that, pursuant to *Nealy*, the error did not "affect" those rights because no rational jury would have held otherwise even if the drug quantity had been submitted.

Various other circuits have taken the same approach as in *Nealy*. *E.g.*, *U.S. v. Terry*, 2001 WL 13156 (1st Cir. Jan. 10, 2001) ("We ask what prospects there were that the submission of the question—whether the trigger drug quantity amount was met—to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury. Given the trial evidence about the quantity of drugs, there was no prejudice to Terry. In each of the three transactions in 1997, Terry directly sold Bennett, a cooperating witness, far more than 50 grams of cocaine base in controlled buys."); *United States v. Anderson*, 2001 WL 10637 (8th Cir. Jan. 5, 2001) ("Because no rational jury could have found appellants guilty of the substantive offense, yet at the same time found that the amount of methamphetamine the conspiracy sought to produce was less than five grams, we hold the *Apprendi* error to be harmless beyond a reasonable doubt.") (citing *Nealy*, 232 F.3d at 830); *United States v. Nance*, 2000 WL 1880629 (7th Cir. Dec. 29, 2000) (concluding that harmless error analysis under *Neder* must be applied even if the defendant preserves his *Apprendi* objection and holding "If it is clear beyond a reasonable doubt that a properly worded indictment and a properly instructed jury would have found Wendell guilty absent this error, then we cannot say that the error was so serious that it requires us to set aside the judgment. If this jury was going to convict Wendell at all—which it plainly did—there is simply no way on this record that it could have failed to find that he was conspiring to distribute 5 grams or more of crack cocaine.").

The court notes, however, that there remains some uncertainty among the circuits and even within individual circuits on the issue of whether *Apprendi* errors can ever be harmless. For example, compare the above cases with

United States v. McWaine, 2001 WL 30615 (5th Cir. Jan. 12, 2001); *United States v. Meshack*, 225 F.3d 556, 577-58 (5th Cir. 2000) ("plain error analysis . . . does not allow us to uphold Meshack's life sentences because those sentences are longer, at least in theory, than his unchallenged concurrent sentence of 360 months for a different crack cocaine possession count. Thus, in light of the government's concession that *Apprendi* applies, we must vacate Meshack's two life sentences and remand to the district court for appropriate proceedings."); and *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (applying the harmless error standard from *Neder* but finding that defendant had shown that the error was not harmless because he vigorously contested at trial the amount of marijuana plants growing on his land). Also, it should be noted that a subsequent panel of the Eighth Circuit, in *U.S. v. Yakle*, 2001 WL 25719 (8th Cir. Jan. 11, 2001) seems to reach a different result from that in *Anderson*, decided only 6 days earlier, without even referring to either *Anderson* or *Nealy*, which was cited favorably by the *Anderson* panel.

Despite the ongoing debate among the circuits, however, the *Nealy* decision is binding on this Court and covers the situation before the Court. Accordingly, it is hereby

ORDERED AND ADJUDGED

1. The Defendants' objections to the PSR which relate to the application of *Apprendi* are overruled.

2. This matter is set for final sentencing hearing for defendant Madrid at 1:00 p.m. on January 30, 2001, and for defendant Knock at 2:00 p.m. on January 30, 2001. The issues resolved by this Order will not be re-argued at the final sentencing hearing, but all

Apprendi related objections raised by the parties thus far will be considered preserved.

DONE AND ORDERED this 23rd day of January, 2001

/s/ Maurice M. Paul

Maurice M. Paul, Senior District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CASE NO. 1:94cr1009 MMP

Filed May 24, 2000

UNITED STATES OF AMERICA,

vs.

JOHN KNOCK and ALBERT MADRID,

Defendants,

vs.

NAOMI KNOCK,

Respondent.

ORDER

The Court is currently conducting a trial for Defendants Knock and Madrid. The Government issued a subpoena for Mrs. Naomi Knock, wife of Defendant Knock, to testify. In addition, the Government proffered a faxed letter and its cover sheet, both written by Mrs. Knock. *See* Exhs. 175 and 176. On May 18, 2000, Mrs. Knock appeared in this Court, represented by her own attorney, to assert various

privileges. The Court held hearings on all these issues on May 18 and 19, 2000.

At these hearings, essentially two categories of legal issues were raised. First, Mrs. Knock declined to comply with the subpoena by asserting the adverse spousal privilege and the marital communications privilege.[1] Second, Mrs. Knock asserted that her letter was not admissible under the attorney-client privilege and the marital communications privilege, and Defendant Knock asserted that Mrs. Knock's letter was protected by his attorney-client privilege, the marital communications privilege, and the Fourth Amendment. Furthermore, if the letter was admissible, Defendant Knock moved for a mistrial.

Government's Subpoena of Mrs. Knock

The Government desires for Mrs. Knock to testify against her husband, Defendant Knock. In declining to testify, Mrs. Knock first asserts an adverse spousal privilege pursuant to *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980).[2] Under this privilege, a witness generally may not be compelled to testify against a spouse who is accused of a crime. *See id.* at 53, 100 S.Ct. at 914. In response, the Government argues that the privilege is not applicable in the instant case because of the "partners-in-crime" exception, which is also known as the "joint partic-

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[1] Mrs. Knock also raised her Fifth Amendment privilege against self-incrimination. In a separate order, this Court compelled Mrs. Knock to testify pursuant to 18 U.S.C. § 6002, thereby granting her use immunity and abrogating her privilege against self-incrimination for purposes of this proceeding. *See* Order of May 18, 2000 (Doc. 632).

[2] This privilege is also referred to as the marital witness privilege. *See* 25 C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure*, § 5601, at 807 (1989).

ipants" exception.[3] *See United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983) ("joint participants"); 25 C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure* § 5601, at 807 (1989) ("partners-in-crime").

Some courts have rejected the partners-in-crime exception to the adverse spousal privilege. *See, e.g., In re Grand Jury Subpoena*, 633 F.2d 276, 278 (3d Cir. 1980); 25 Wright & Graham, *supra* § 5601, at 807 & n.71. The Eleventh Circuit has not spoken to the applicability of the exception.[4] The Seventh Circuit, however, has adopted the partners-in-crime (or "joint participants") exception, and in support thereof, it has noted:

> [There are] are two reasons for creating the joint participants exception. The first [is] that the goal intended to be served by the privilege . . . [does] not justify assuring a criminal that he or she could enlist the aid of a spouse in a criminal enterprise without fear that by recruiting an accomplice the criminal was creating another potential witness. The second reason [is] that the rehabilitative effect of a marriage, which in part justifies the privilege, is diminished when both spouses are participants in crime.

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[3] At the hearing, counsel for the Government also referred o the "crime-fraud" exception. The crime-fraud exception, however, is distinct from the partner-in-crime exception and is generally not applicable in regards to the adverse spousal privilege. *See* 25 C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure*, § 5594, at 768 & N.11 (1989). Despite the confusion in terminology, the Government's arguments articulated a partner-in-crime exception.

[4] However, the partner-in-crime exception has been adopted in this circuit with respect to the marital communications privilege. *See infra* at 4; *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).

Clark, 712 F.2d at 301 (citing *United States v. Van Drumen*. 501 F.2d 1393, 1397 (7th Cir. 1974)).

This Court agrees with the reasoning of the Seventh Circuit and thus adopts the partner-in-crime exception. As was noted by the Government at the hearing, sufficient evidence exists in this record for the Court to find that Mrs. Knock was a partner-in-crime with John Knock. In particular, the evidence shows that Mrs. Knock assisted Defendant Knock in transmitting large sums of unaccounted money. Therefore, the adverse spousal privilege does not block Mrs. Knock from testifying.[5]

The second ground raised by Mrs.Knock in support of her refusal to testify is the marital communications privilege. Under this privilege, communications "privately disclosed between husband and wife in the confidence of the marital relationship" are protected. *United States v. Parker*, 834 F.2d 408, 414 (4th Cir. 1987). Nevertheless, unlike the adverse spousal privilege, the law in this circuit on the marital communications privilege is clear, for the privilege does not protect communications "between husband and wife about crimes in which they are jointly participating." *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978);[6] *accord Parker*, 834 F.2d at 411 & n.5. In other words, the aforementioned partner-in-crime excep-

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[5] In finding the adverse spousal privilege inapplicable, the Court has in no way affected the rights of Defendant Knock, because the privilege belongs to the *testifying* spouse not to the *accused* spouse. *See Trammel*, 445 U.S. at 53, 100 S.Ct. at 914. Therefore, Defendant Knock does not have standing to raise the adverse spouse privilege.

[6] Decisions of the Fifth Circuit rendered prior to the close of business on September 30, 1981 are binding upon courts of the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

tion also abrogates the communications privilege. As previously explained above, the Court holds there is sufficient evidence to find Mrs. Knock and Defendant Knock were partners-in-crime, and thus the marital communications privilege does not save Mrs. Knock from testifying against her husband.[7] Therefore, Mrs. Knock must comply with the subpoena.

Admission of Mrs. Knock's Letter

The Government desires to admit a letter written by Mrs. Knock (Exh. 176) and a cover sheet that accompanied the letter (Exh. 175). Mrs. Knock faxed this letter to attorney Kennedy's office, and the cover sheet of the fax states "lawyer-client material—confidential." The letter was subsequently sealed and then delivered by attorney Kennedy when he visited Defendant Knock in a French prison. In the letter, Mrs. Knock discusses various issues related to the management of Defendant Knock's attorneys, including the transfer of a large sum of unaccounted money. Later, French authorities—without any prompting from American officials—seized this letter from Defendant Knock's prison. When the French handed Defendant Knock over to the U.S. Marshals, the marshals refused to accept Defendant Knock's personal belongings, which included the letter. Rather, the letter (along with Defendant Knock's other personal things) was given to American

[7] As an alternative basis, the Court holds that the crime-fraud exception also abrogates Mrs. Knock's marital communications privilege. Under this exception, even if the spouses are not partners-in-crime, any communication made by one spouse in furtherance of a crime or fraud is not protected. *See* 25 C.A. Wright & K.W. Graham, Jr., *supra* § 5594, at 768; *see also United States v. Ammar*, 714 F.2d 238, 258 (3d Cir. 1983).

authorities by French officials through diplomatic channels.

Mrs. Knock and Defendant Knock both assert that the Government cannot disclose this letter because of the marital communications privilege. For the same reasons that Mrs. Knock must comply with the subpoena, the Court holds that the partner-in-crime and crime-fraud exceptions abrogate the privilege with respect to the letter. *See supra* at 4 & n.7. In particular, Mrs. Knock's discussion about the transmittal of $2.5 million of unaccounted funds, coupled with other evidence in this case, is sufficient to show that Mrs. Knock's letter was in furtherance of a crime to which she and her husbands were partners.

Mrs. Knock and Defendant Knock next argue that the letter is protected by the attorney-client privilege. For this to be so, the letter must have been made to an attorney or an attorney's subordinate for the purpose of securing legal advice. *See, e.g., In re Federal Grand Jury Proceedings*, 938 F.2d 1578, 1581 (11th Cir. 1991). Such is not the case with this letter. The letter was a communication from Mrs. Knock to Defendant Knock, and attorney Kennedy's role was merely that of a courier. Simply giving a personal letter to an attorney does not put the letter within the scope of the attorney-client privilege.

Defendant Knock's last argument in support of excluding the letter is the Fourth Amendment. This argument is without foundation. When foreign authorities conduct a search and seizure, the Fourth Amendment is generally not invoked, even if American officials are present and cooperate to some limited degree. *See Government of the Canal Zone v. Sierra*, 594 F.2d 60, 72 (5th Cir. 1979). There are two exceptions to the general rule. *See United States v. Rosenthal*, 793 F.2d 1214, 1230 (11th Cir. 1986). First

American Courts will exclude foreign seized evidence if the seizure shocks the conscience. *See id.* at 1230-31. Second, the evidence will be excluded if American officials substantially participate in seizure or the foreign officials are acting as American agents. *See, id.* at 1231. In the instant case, a seizure from a prison does not shock the American conscience, and there is not a scintilla of evidence showing that American officials participated in the seizure of the letter. Therefore, the Fourth Amendment has not been violated, and the letter is ADMITTED.

Lastly, Defendant Knock moves for a mistrial because the letter refers to his trial counsel, attorney Kennedy. Defendant Knock and attorney Kennedy were on fair notice that this letter might be admitted into evidence. At a hearing on September 3, 1999, the Government moved to recuse attorney Kennedy partly on the ground that he had represented Mrs. Knock, and in support of this motion, the Government presented Mrs. Knock's letter and the cover sheet. The issue of a potential conflict of interest was fully explored at that hearing and in the Court's subsequent order of September 13, 1999 (Doc. 529). At a *Garcia*[8] hearing on October 18, 1999, Defendant Knock was fully informed of the potential conflicts if attorney Kennedy continued to represent him. Defendant Knock waived any potential conflict, and he cannot raise it again now. Therefore, the motion for a mistrial is DENIED.

DONE AND ORDERED this 24th day of May, 2000

/s/ MAURICE M. PAUL
MAURICE M. PAUL, SENIOR DISTRICT JUDGE

[8] *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(b)

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of;

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-[(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a

felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of;

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-[(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more

of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If that person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the

provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydrosybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment

of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $100,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law

of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in *section 16 of Title 18* (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with *Title 18*.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

Fed. R. Crim. P. Rule 52 (Harmless and Plain Error)

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

(As amended Apr. 29, 2002, eff. Dec 1, 2002.)

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 03-645

In the Supreme Court of the United States

JOHN RICHARD KNOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a "partners in crime" exception applies to the marital adverse testimony privilege, and whether the petitioner has standing to challenge the district court's application of the exception.

2. Whether an error under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), properly preserved in the district court, is "structural error" under *Arizona* v. *Fulminante*, 499 U.S. 279 (1991).

3. Whether, even if the *Apprendi* error in this case was not "structural error" and was harmless, it nonetheless requires reversal of petitioner's sentence.

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In the Supreme Court of the United States

No. 03-645

JOHN RICHARD KNOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. A petition for rehearing was denied on July 31, 2003 (Pet. App. 12a-13a The petition for a writ of certiorari was filed on October 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury, sitting in the Northern District of Florida, returned a four-count superseding indictment charging petitioner with conspiracy to possess marijuana with the intent to distribute it, conspiracy to

import marijuana, conspiracy to commit money laundering, and criminal forfeiture. Pet. App. 3a, 24a-25a. Following a four-week jury trial, the jury found petitioner guilty as charged. Petitioner was sentenced to life imprisonment and a $4 million fine. Pet. App. 3a. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner, along with co-conspirator Claude Duboc, headed a drug organization that from 1984 to 1993 imported and distributed approximately 790,000 pounds of marijuana and hashish and in turn laundered proceeds from the drug distribution. Co-defendant Albert Thomas Madrid worked directly under petitioner and engaged in offloading and distribution of the marijuana and hashish. Gov't C.A. Br. 9.

Petitioner's organization began to import and distribute large loads of hashish and marijuana in 1984. From 1984 through 1986, petitioner and Duboc also distributed hashish in Canada. Gov't C.A. Br. 9-10. In 1987, petitioner and Duboc directed that an offload crew be organized to unload 30 tons of hashish from one ship onto another vessel and to transport it into the San Francisco, California, area. The drugs were taken to co-defendant Madrid's nearby property, where petitioner and others repackaged the drugs for distribution throughout the United States. *Id.* at 10. In 1988, petitioner and Duboc oversaw the importation into San Francisco of a 56-ton load of marijuana and hashish, which was seized by law enforcement. *Ibid.*

Between 1988 and 1993, petitioner was involved with the importation of multi-ton shiploads of drugs to Canada and Australia and the laundering of millions of dollars in proceeds. Gov't C.A. Br. 10-13. In July 1993, a 17-ton load of marijuana was imported into Washington State, transported to a location near Sacramento, California, and then distributed from there. *Id.* at 13.

From 1993 through 1996, petitioner and his organization were involved in avoiding apprehension, collecting moneys owed for the various drug importations, and laundering the proceeds from those importations. Gov't C.A. Br. 17-19. In March 1994, Duboc informed Julie Roberts, an individual who had earlier been recruited to offload hashish into San Francisco and who later collected money for the organization, see *id.* at 10, 17-18, that he was going to Hong Kong to clean out his accounts there before the authorities arrived. Duboc told Roberts that, if anything happened to him, petitioner would be taking over supervision of the collection of money from an individual named Michael Rogerson, who owed approximately $20 million for importations into the United States and Canada in 1993. *Id.* at 17-18.

On March 10, 1994, Duboc was indicted, and on March 25, 1994, he was arrested in Hong Kong. The next day petitioner called Roberts in New Mexico and told her that he was taking over the collection of the money and he wanted to keep in contact with her. For about six months, Roberts continued to attempt to collect the $20 million from Rogerson and continuously reported her efforts to petitioner. Petitioner and others made suggestions to Roberts about methods to induce Rogerson to pay the money. Gov't C.A. Br. 18.

In February 1996, Roberts surrendered to authorities. She arranged for petitioner to be at a pay phone in Paris, France, on April 17, 1996, to receive a call from her, and at that time petitioner was arrested. Gov't C.A. Br. 19.

After petitioner's arrest, an individual named Steve Abelman, an acknowledged participant in importing marijuana and hashish, possessed a carrying case containing $1 million in Deutschmarks. Abelman stated

that he had been involved in criminal activity in the past with a person named "John" who lived in Hawaii, and that he and "John" had paid people to drive hashish and marijuana across the United States. Petitioner, whose first name is "John," lived in a house in Hawaii. Abelman also stated that he was trying to raise $4 million to help "John" because "John" was in jail in France. Abelman stated that the $1 million had come from John's wife and he was passing it on to someone else. Gov't C.A. Br. 19-20 & n.9.

As early as 1992, Naomi Knock, petitioner's wife, assisted by the same financier who was with Duboc when he was ultimately arrested in Hong Kong, established a foreign company that held over $5 million. During the time that Roberts was in contact with petitioner about collecting the $20 million in drug proceeds, Ms. Knock spoke to Roberts several times and asked Roberts to relay messages to petitioner that she needed money to pay the attorneys representing him. Gov't C.A. Br. 20-21.

2. At trial, the government called Ms. Knock as a witness. Ms. Knock was represented by her own, separate, counsel. Through her counsel, Ms. Knock invoked her Fifth Amendment right against compelled self-incrimination and the husband-wife privileges for confidential communications and adverse spousal testimony. The government immunized Ms. Knock. After a hearing, the court found that Ms. Knock's marital privilege claim was overcome by the exception to both husband-wife privileges applicable when the husband and wife were joint participants in crime. Petitioner's attorney then claimed that he had a conflict that required that a mistrial be declared. The district court denied the motion. Gov't C.A. Br. 21.

Petitioner's sister-in-law, Dana Jafe, testified that in early 1996 a woman delivered a briefcase of money for Ms. Knock, Jafe's sister and petitioner's wife. Jafe informed Ms. Knock of the delivery, and Ms. Knock later took possession of the briefcase. Gov't C.A. Br. 20.

Ms. Knock testified that the briefcase she picked up from Jafe contained $60,000 and that she used the money for attorney fees and for living expenses. With respect to the $1 million Abelman possessed, Ms. Knock testified that she released it to a man who gave it to Abelman and that she did not know the amount of money that she had released. At petitioner's direction, petitioner's attorney waived cross-examination of Ms. Knock. Gov't C.A. Br. 21-22.

ARGUMENT

1. Petitioner argues (Pet. 7-10) that the district court erred in applying the "partners in crime" exception to the adverse spousal testimony privilege and on that basis compelling petitioner's wife to testify at his trial. He also argues (Pet. 10) that the court of appeals erred in holding that he lacked standing to assert a privilege held by his wife.

a. The Eleventh Circuit's decision that a defendant has no standing to challenge on appeal a district court's decision to compel testimony from a testifying spouse is correct and does not conflict with any decision of any other court of appeals. As this Court held in *Trammel* v. *United States*, 445 U.S. 40, 53 (1980), "the witness-spouse alone has a privilege to refuse to testify adversely." Accordingly, the privilege is held by the witness-spouse alone, and the defendant has no standing to challenge the witness-spouse's decision to testify or a district court's order compelling testimony.

The courts of appeals that have addressed the issue have, without exception, held that a defendant lacks standing to challenge on appeal a district court's ruling with respect to a witness-spouse's adverse testimony privilege. See, *e.g.*, *United States* v. *Ramos-Oseguera*, 120 F.3d 1028, 1034 n.1 (9th Cir. 1997), cert. denied, 522 U.S. 1135 (1998), overruled on other grounds, *United States* v. *Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States* v. *Anderson*, 39 F.3d 331, 350 (D.C. Cir. 1994); *United States* v. *Lofton*, 957 F.2d 476, 47 n.1 (7th Cir. 1992); *Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985). Cf. *Labbe* v. *Berman*, 621 F.2d 26, 28 & n.3 (1st Cir. 1980) ("Under Massachusetts law, the privilege belongs to the witness spouse, not to the accused, and the accused has no standing to assert error in the court's admission of the privileged testimony.").[1]

Petitioner cites *United States* v. *Smith*, 742 F.2d 398, 401 (8th Cir. 1984), and *United States* v. *Bad Wound*, 203 F.3d 1072, 1074-1075 (8th Cir. 2000), in support of a claim of a circuit split on the question whether the defendant-spouse has standing on appeal to question the district court's application of the privilege. In neither of these cases, however, did the court of appeals

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[1] This Court acknowledged a related standing question in *Wyatt* v. *United States*, 362 U.S. 525, 527 n.3 (1960), where it noted that, because the witness-spouse's testimony, even if wrongly compelled, is admissible and relevant, commentators have "argued that the [defendant] has suffered no injury of which he may complain." The Court stated however, that "as the point has not been briefed or argued, we have thought it appropriate, in view of our disposition of the case on the merits, not to consider the issue of standing, and of course intimate no view on it." *Ibid.* The Court concluded, on the merits, that the district court did not err in compelling the testimony.

address the issue of standing. There is nothing in either opinion to suggest that the question of standing was raised in the court of appeals by either party. The court simply held, in *Smith*, that the witness-spouse's testimony was not adverse to her husband's interest, 742 F.2d at 401, and, in *Bad Wound*, that the witness-spouse had voluntarily waived her privilege, 203 F.3d at 1075. The Eighth Circuit did not reach a conclusion on the standing issue in either case, and there is accordingly no conflict in the circuits on the issue.

b. Petitioner's lack of standing to raise the privilege would preclude the Court from reaching the question he seeks to present about the proper scope of the spousal testimony privilege and the "partners in crime" exception to the privilege. Even if petitioner had standing to raise the question, however, this case would be an inappropriate vehicle for considering whether a "partners in crime" exception should apply to the adverse spousal testimony privilege. Assuming that the district court committed an error in compelling Ms. Knock's testimony, that error was harmless.

In the course of a four-week trial, the government introduced overwhelming evidence that petitioner headed a drug organization that, for nearly a decade, imported and distributed hundreds of tons of marijuana and hashish and laundered the illegal proceeds from that enterprise. See pp. 2-4, *supra*. Ms. Knock's testimony constitutes only nine pages of the more than 2200-page, 15-volume trial transcript. Docket 107-109.

Moreover, Ms. Knock's testimony introduced no new evidence but instead merely corroborated testimony of other witnesses. Ms. Knock testified that she had picked up a suitcase full of cash from her sister. That testimony confirmed the sister's testimony that she had been given a suitcase, which she was told contained

cash, and that she gave it to Ms. Knock. Ms. Knock also testified that, after petitioner's arrest, she had released money to be given to a man named Steve Abelman to pay for her husband's legal fees. That testimony supported testimony by another witness who said Mr. Abelman showed her a suitcase full of $1 million in cash, said it had come from Ms. Knock, and said he was trying to help petitioner get out of prison. Gov't C.A. Br. 21-22.

Ms. Knock's testimony added little to the overwhelming weight of the evidence against petitioner. Therefore, even if the district court erred in compelling Ms. Knock's testimony, the error was harmless as a matter of law.

c. On the merits, the district court did not err in adopting a "partners in crime" exception to the adverse spousal testimony privilege. There is disagreement among the circuits with respect to that exception. Compare *United States* v. *Clark*, 712 F.2d 299, 300-301 (7th Cir. 1983) (adopting exception); *United States* v. *Trammel*, 583 F.2d 1166, 1167-1171 (10th Cir. 1978) (same), aff'd on other grounds, 445 U.S. 40 (1980), with *United States* v. *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting exception); *In re Grand Jury Subpoena*, 755 F.2d 1022, 1025-1028 (2d Cir. 1985), vacated as moot, 475 U.S. 133 (1986); *In re Malfitano*, 633 F.2d 276, 278-279 (3d Cir. 1980) (same). The courts that have adopted the exception, however, have reached the correct conclusion.

As the Court recognized in *Trammel*, the adverse spousal testimony privilege has been sharply criticized. 445 U.S. at 44 (noting that "Professor Wigmore termed it 'the merest anachronism in legal theory and an indefensible obstruction to truth in practice,'" and that "[t]he Committee on Improvements in the Law of

Evidence of the American Bar Association called for its abolition"). At the time of the Court's decision in *Trammel*, seventeen states had abolished the adverse spousal testimony privilege altogether. *Id.* at 49 n.9 (collecting statutes). Since *Trammel*, at least three more states have eliminated the adverse testimony privilege, see Iowa Code Ann. § 622.9 (West 1999); N.M. Stat. Ann. § 38-6-6 (Michie 1998); Utah Code Ann. § 78-24-8 (1996), and one has explicitly adopted a partners-in-crime exception to it, see Ky. R. Evid. 504.

"Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel*, 445 U.S. at 50 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). "As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Ibid.* (internal quotation marks and citation omitted).

Trammel identified the modern justification for the privilege as "its perceived role in fostering the harmony and sanctity of the marriage relationship." 445 U.S. at 44. But, as the court of appeals correctly concluded in *United States* v. *Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), "that goal does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness."

The adverse spousal testimony privilege, which allows a witness-spouse to refuse to testify against the defendant-spouse, is closely related to the marital communications privilege, which allows the defendant-

spouse to bar testimony concerning confidential marital communications. Ten courts of appeals have recognized an exception to the marital communications privilege in cases where the husband and wife are joint participants in the underlying offense or where the communications relate to ongoing or future criminal activity involving both spouses. See *United States* v. *Bey*, 188 F.3d 1, 4-5 (1st Cir. 1999); *United States* v. *Short*, 4 F.3d 475, 478 (7th Cir. 1993); *United States* v. *Evans*, 966 F.2d 398, 401 (8th Cir.), cert. denied, 506 U.S. 988 (1992); *United States* v. *Marashi*, 913 F.2d 724, 731 (9th Cir. 1990); *United States* v. *Parker*, 834 F.2d 408, 411 (4th Cir. 1987), cert. denied, 485 U.S. 938 (1988); *United States* v. *Estes*, 793 F.2d 465, 468 (2d Cir. 1986); *United States* v. *Sims*, 755 F.2d 1239, 1243 (6th Cir.), cert. denied, 473 U.S. 907 (1985); *United States* v. *Kapnison*, 743 F.2d 1450, 1455 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985); *United States* v. *Ammar*, 714 F.2d 238, 258 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978).[2]

Those courts have reasoned that "where spouses engage in conversations regarding joint ongoing or future patently illegal activity * * * the public's interest in discovering the truth about criminal activity outweigh[s] the public's interest in protecting the privacy of marriage." *Sims*, 755 F.2d at 1243. That analysis applies with equal weight to the adverse spousal testimony privilege: the public's interest in discovering the truth about criminal activity outweighs the public's interest in "fostering the harmony and sanctity of [a]

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[2] All decisions of the Fifth Circuit rendered before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

marriage relationship" between criminal co-conspirators. *Id.* at 1240 (quoting *Trammel*, 445 U.S. at 44) The district court did not err in adopting the exception.

2. Petitioner contends that his life sentence should be vacated under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the enhancing fact of drug quantity was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Petitioner urges the Court to grant certiorari in this case to decide whether a properly preserved *Apprendi* error constitutes a structural error under *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). Further review to address that question is unwarranted.

This Court has made clear that "most constitutional errors can be harmless," *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (quoting *Fulminante*, 499 U.S. at 306), and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a complete denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997)).

In *Neder*, the Court held that a district court's failure to submit an element of the offense to the jury is not a structural error. Instead, the Court explained that such an error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 15, 18. The error in this case—the imposition of an enhanced sentence based on a fact that was not specified in the

indictment or submitted to the jury for determination —is analogous to the error in *Neder*. In both contexts, there is no effect on substantial rights, and the error is harmless, when the record reveals that the grand jury and petit jury would have found the omitted fact, if they had been asked to do so.

In *United States* v. *Cotton*, 535 U.S. 625 (2002), the Court applied the plain-error standard of review to the defendants' challenge, raised for the first time on appeal, to the imposition of an enhanced sentence based on drug quantity that was not alleged in the indictment or found by the petit jury. The Court held that a defendant cannot satisfy the fourth component of the plain-error standard, which considers whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," when the evidence of drug quantity is "overwhelming" and "essentially uncontroverted." *Id.* at 633 (quoting *Johnson*, 520 U.S. at 470). The Court did not address whether the defendants in *Cotton* could satisfy the third component of the plain-error standard, either because the error was "structural" or because it otherwise affected their substantial rights. See *id.* at 632 & n.2. In concluding that the error did not require reversal, however, the Court observed that, although "the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power," the similarly "important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'" *Id.* at 634 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)).

Cotton suggests that the imposition of an enhanced sentence based on a fact that was not submitted to the grand jury or the petit jury for determination does not fall within the "very limited class" of "structural" errors that "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (internal quotation marks omitted). It follows from *Neder*'s holding and *Cotton*'s reasoning that the error in this case was not structural.

All of the courts of appeals that have considered the question have held that *Apprendi* errors are not structural. See *United States* v. *Stewart*, 306 F.3d 295, 321 (6th Cir. 2002), cert. denied, 537 U.S. 1138 and 1146, and 123 S. Ct. 2074 (2003); *United States* v. *Friedman*, 300 F.3d 111, 127-128 (2d Cir. 2002), cert. denied, 123 S. Ct. 1785 (2003); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 670 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *United States* v. *Adkins*, 274 F.3d 444, 454 (7th Cir. 2001), cert. denied, 537 U.S. 891 (2002); *United States* v. *Vazquez*, 271 F.3d 93, 103 (3d Cir. 2001), cert. denied, 536 U.S. 963 (2002); *United States* v. *Anderson*, 236 F.3d 427, 429 (8th Cir.), cert. denied, 534 U.S. 956 (2001); *United States* v. *Nealy*, 232 F.3d 825, 829 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001). Cf. *United States* v. *Sanders*, 247 F.3d 139, 150 (4th Cir.) (citing cases in which *Apprendi* errors were evaluated for harmless or plain error and noting that "[n]one of these cases have suggested that failure to submit the question of drug quantities to a jury is structural error"), cert. denied, 534 U.S. 1032 (2001); *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 48 (1st Cir.) (finding *Apprendi* error harmless), cert. denied, 123 S. Ct. 2589

and 2590, 124 S. Ct. 71 and 118 (2003). Further review is not warranted.

3. Petitioner argues that, even if harmless-error review is generally applicable to *Apprendi* errors and even if the *Apprendi* error in this case was harmless, the court of appeals should nonetheless have reversed petitioner's sentence because, in petitioner's view, the district court "explicitly and purposely refuse[d] to follow the law." Pet. i. Petitioner's characterization of the district court's action is wrong, and further review is unwarranted.

a. Petitioner was convicted, *inter alia*, of conspiracy to possess marijuana with intent to distribute it, an offense that is subject to the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's sentence was authorized by 21 U.S.C. 841(b)(1)(A), which provides for a sentence of up to life imprisonment for an offense involving 1000 kilograms or more of marijuana. The sentence was not authorized, however, by Section 841(b)(1)(D), which provides for a sentence of up to five years' imprisonment for an offense involving any detectable quantity of marijuana. Petitioner's sentence therefore depended on an increase in the statutory maximum sentence by virtue of a fact—drug quantity —that was not specified in the indictment or found by the jury to have been proved beyond a reasonable doubt. Accordingly, the district court committed error under *Apprendi* in sentencing petitioner to life imprisonment based on a factual determination made by the court at sentencing.

The court of appeals recognized that an *Apprendi* error had occurred in this case. Pet. App. 11a. After undertaking a harmless-error analysis, the court of appeals concluded that "[i]n view of the overwhelming record evidence of the massive drug conspiracy alleged

in this case, no reasonable juror could have found [petitioner] guilty of conspiracy to possess with the intent to distribute marijuana from 1982 [to] 1996 without finding the minimum 1,000 kilograms threshold to impose a life sentence under [Section 841(b)(1)(A)]." *Ibid.* See *id.* at 30a (district court's statement that petitioner "did not dispute the fact that the only evidence submitted to the jury was of shipload-sized loads of marijuana clearly greater than 1000 kilograms").[3] The court of appeals' conclusion was correct, and further review is not warranted.

b. Petitioner argues that the district court "purposefully refuse[d] to apply controlling law," Pet. 17, and that further review is warranted to address whether "the district court committed a good-faith error as opposed to a result-oriented express disregard for the rule of law announced by this Court," Pet. 15.

The district court did not, in petitioner's words, "purposefully refuse to apply controlling law." The district court instead believed that the *Apprendi* error in this case had already occurred prior to sentencing. The court referred to "the *prior* error of this court to instruct the jury regarding drug amounts and the *prior* error of this court in failing to require the jury to find

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[3] The evidence at trial established, *inter alia*, (1) that in 1987, petitioner conspired to transport *30 tons* of hashish into the San Francisco, California, area, for distribution throughout the United States, see R821-192-195, 198-211; (2) that in 1988, petitioner conspired to import a *56-ton* load of marijuana and hashish, and that the load was seized by law enforcement, see R821-222-224; R877-111; R893-3-12; R900-90; and (3) that petitioner's decade-long drug enterprise typically imported and distributed hashish and marijuana in quantities of *30 tons* or more, see R821-18, 202; R876-105-06; R877-52, 73-76, 95, 100-110, 126, 178-81; R880-19-20, 104; R893-3-12.

those drug amounts beyond a reasonable doubt constitute errors." Pet. App. 30a (emphasis added). The district court believed that those "*prior* errors" had to be disregarded as harmless under the terms of Federal Rules of Criminal Procedure 52(a). Pet. App. 30a n.1 (emphasis added). The district court did not believe that its imposition of sentence under Section 841(b)(1)(A) was itself the commission of a new error. There is no basis for petitioner's charge that the district court engaged in a "result-oriented express disregard for the rule of law announced by this Court." Pet. 15.

It turns out that the district court's analysis was mistaken with regard to the timing of the *Apprendi* error, because, as petitioner argues, such an error occurs only at the time a sentence that has not been authorized by the jury's findings is imposed. See Pet. 14-15. Nonetheless, the result of the district court's mistaken analysis was simply that it committed an *Apprendi* error—*i.e.*, it imposed a sentence higher than that which was authorized by the jury's findings. As petitioner himself concedes "[d]istrict court judges operating in good faith are bound to make honest mistakes especially in transitionary periods, and such judges are entitled to the deference accorded by application of the * * * Rule 52(a) standard of review." Pet. 15. The district court in this case made just such an "honest mistake[]" in a "transitiona[l] period[]." Contrary to petitioner's characterizations, there was no "extreme departure from the accepted and usual course of judicial proceedings," Pet. 13, or "disregard for the rule of law," Pet. 15. There is no basis for further review of the fact-based harmless-error issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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